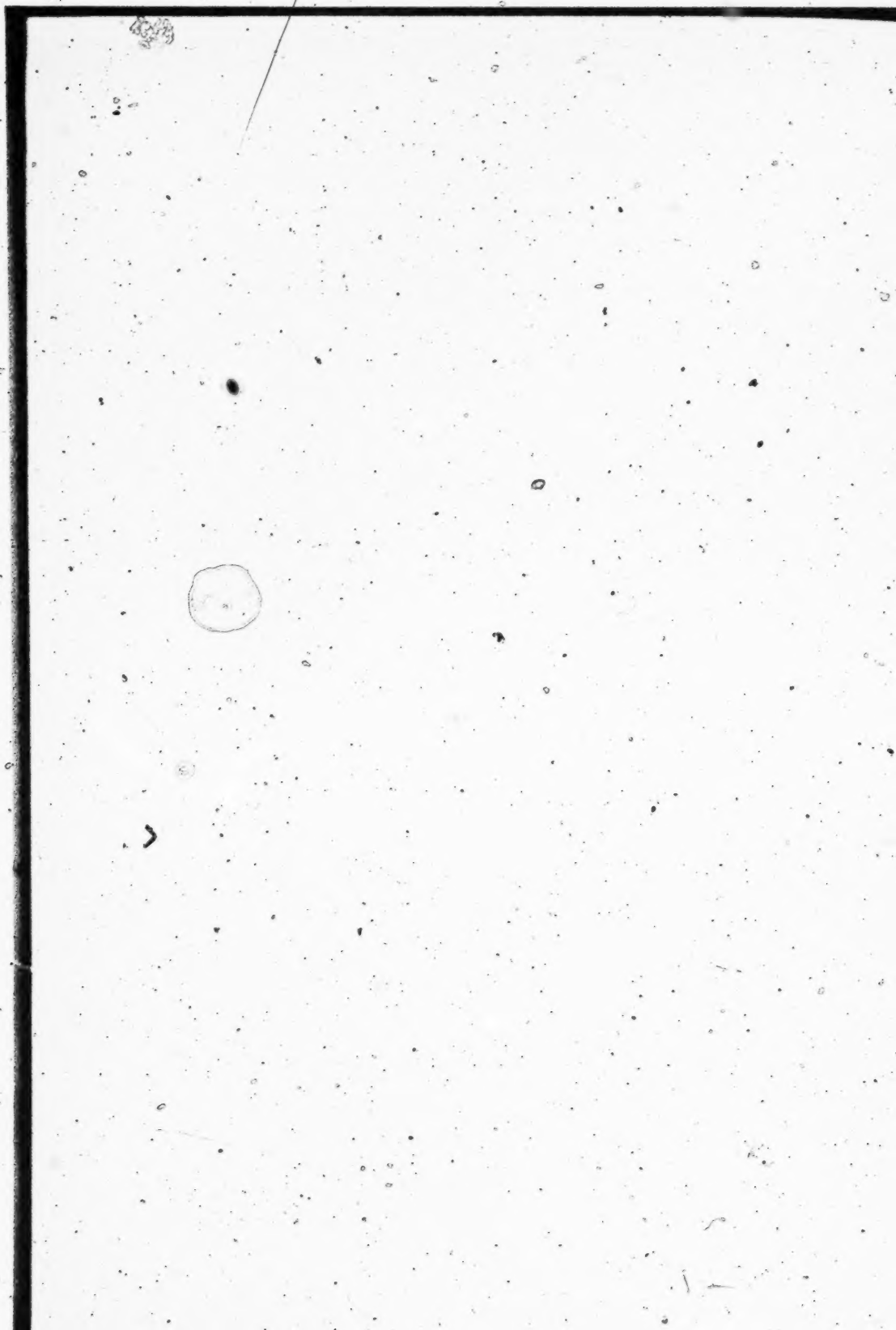

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IN THE SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1967

No. 154

LUCILLE MILLER,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA,
FOURTH APPELLATE DISTRICT

BRIEF OF THE PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 154

LUCILLE MILLER,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

BRIEF OF THE PETITIONER

Citations to Opinions Below

The judgment of the Supreme Court of California, denying hearing, is not reported and appears as a minute order in the Court's records (Minute Order in Case No. 2512).

The opinion of the District Court of Appeal is reported at 53 Cal. Rptr. 720 (also 245 A.C.A. 111).

Jurisdiction

The California District Court of Appeal, Fourth Circuit, Division 1, affirmed petitioner's first degree murder conviction on September 22, 1956 (rehearing denied on October 20, 1966). The California Supreme Court declined review on December 14, 1966, thereby affirming the judgment of conviction. Mr. Justice Douglas granted an extension of time, until May 13, 1967, within which to file the petition for a writ of certiorari. This Court granted certiorari on December 4, 1967, limited to questions I and II raised in the petition. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

The questions presented here were raised at the trial by an objection made outside the hearing of the jury in an on-the-record proceeding (see trial transcript pp. 1007-15); they were raised in both appeals and considered in detail by the District Court of Appeal, see, 53 Cal. Rptr. at 738-740. This Court's power to review the judgment was discussed at length in the petition for certiorari at pages 7-13, to which the Court is respectfully referred.

Constitutional Provisions

The constitutional provisions involved are the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. They are printed in 1 U.S.C. XLVI.

Questions Presented

I. Whether the introduction of admissions made to an undercover agent planted in petitioner's jail cell constituted a violation of petitioner's constitutional rights to counsel and against self-incrimination.

II. Whether inculpatory admissions, obtained under circumstances like those here involved, can ever constitute harmless error.

Statement

a. *The Discovery of the Alleged Crime*

About 1:45 a.m. on October 8, 1961, petitioner, Mrs. Lucille Miller, arrived at the home of Mrs. Maurice Swenson in Alta Loma, California, saying that her husband Dr. Gordon Miller was trapped inside a burning car. Mrs. Swenson called the sheriff's office and, at Mrs. Miller's request, also called Harold J. Lance, a close friend of the Millers and their family attorney (R. 63-70).[1] When Lance and a fire company arrived at the Swenson home, Mrs. Miller led them back to the burning Volkswagen. After some time the fire was extinguished; Dr. Miller was dead (R. 86-90). Lance then drove petitioner home, but they returned to the scene at about 3:00 a.m. (R. 128-31), where she told the police officer present that she had been driving with her husband when she lost control of the car which ran up on the side of the road. She said that she must have been dazed and that the next thing she knew, flames were springing up behind her. In panic, she jumped out of the car and ran around to the other side to pull her

[1] R. refers to the official transcript of the trial record.

husband out, but his door was locked. She tried, but failed, to open the door, and after realizing that she could do nothing more, she went to the Swenson home to get help (R. 365-70).

b. *The Arrest, Booking, and Initial Interrogation*

At 1:50 p.m. on October 9, three deputy sheriffs entered Mrs. Miller's home and placed her under arrest for murder (R. 60, 1017). She was taken to the San Bernardino County jail where she was met by her attorney and "booked" for murder (R. 1018). At 9 a.m. she was taken from her cell and questioned for several hours.[2]

c. *The Undercover Agent in Petitioner's Jail Cell*

At about 11 p.m. on October 9, Peggy Fisk, an undercover agent in the employ of the Sheriff's office, was falsely "booked" on a narcotics violation and placed in petitioner's cell (R. 1103). Shortly thereafter, the two other prisoners who had been sharing the cell with petitioner were removed so that Miss Fisk could be alone with petitioner in the cell (R. 1107-08). Miss Fisk remained alone in the cell with petitioner for 7 days, until Oct. 15. During that period, petitioner had a number of retained lawyers who remained on duty outside her cell 24 hours a day in order to assure that the authorities would respect her privilege against self-incrimination (R. 2319). Petitioner, of course, did not have counsel inside the cell. Nor did she think she needed one there, for Miss Fisk never told petitioner

[2] A tape of this interrogation was introduced at petitioner's trial. During this interrogation, petitioner repeated the story she told the police the previous night. She admitted that she had been involved in an affair with a Mr. Hayton but claimed that the affair had ended in August (R. 1017-25, 1079-90).

that she was a police agent rather than a real prisoner, or that petitioner had right to remain silent and have an attorney present at all their "discussions." On October 13, during the period that Miss Fisk was in the cell, a complaint charging petitioner with murder was filed in the Municipal Court, and petitioner was arraigned on that date.[3] Miss Fisk remained in the cell and continued to obtain incriminating statements even after petitioner had been formally charged and arraigned.

d. *The Trial*

Petitioner's second trial commenced on January 11, 1965.[4] The state's theory was that the fire that killed Dr. Miller was of incendiary, rather than accidental, origin (R. 244-62); that petitioner was infatuated with Mr. Hayton and did not love her husband (R. 4-12, 1258, 2015-19) and that petitioner therefore started the fire to be rid of her husband so that she could marry Hayton and collect the $100,000 insurance of which she was the beneficiary in the event of her husband's accidental death. The defense theory was that the fire was of accidental rather than incendiary origin (R. 1567-78, 1805-13); that although petitioner had been infatuated with Mr. Hayton, the affair was over several months before Dr. Miller's death (R. 874, 935, 1783-88); that petitioner was reconciled with her husband at the time of his death; and that petitioner would not be motivated

[3] The judge issued an order prohibiting officials from questioning petitioner unless her attorney was present. He also ordered petitioner's attorneys to stop sitting outside the cell. The prosecutor violated the order by keeping Miss Fisk in the cell with petitioner until October 15.

[4] Her first trial ended after several days of jury selection in a mistrial declared by the judge because of highly prejudicial publicity appearing in the local press (R. 3).

to kill a successful $30,000 a year dentist in order to collect a mere $100,000 in insurance.

As these conflicting theories were unfolding, Peggy Fisk was called as a government witness. Petitioner's counsel objected to permitting Miss Fisk to testify, on the ground, among others, that such testimony would violate "the rule in *Messich* (sic) versus the *United States*." (See petition for certiorari at pp. 7-13.) Peggy Fisk testified that petitioner had admitted to her that "she did not love her husband"; that "she always loved Mr. Hayton and still did"; and that she was planning to go to Europe with the $100,000 in insurance (R. 1100-01). The prosecutor relied heavily on Miss Fisk's testimony during the course of the trial and in his closing remarks to the jury (R. 1258-59, 2019, 2061-62, 2318-20).

The jury deliberated for more than three days before returning a verdict of guilty of murder in the first degree (R. 2376, 2441).

Summary of Argument

I. This Court's prior decisions establish the unconstitutionality of planting an undercover agent in the jail cell of an unsuspecting defendant for purposes of eliciting incriminating statements. Indeed, the Attorney General seems to concede the unconstitutionality of this practice. He argues, however, that the statements at issue here were "spontaneous remarks" unconnected with the conduct of the undercover agent. This argument is conclusively rebutted by the record and the opinion of the lower court, both of which establish beyond any doubt that the statements were intentionally elicited by a series of leading questions carefully designed by the police and executed by the agent.

II. This Court has held, in an unbroken line of cases beginning in 1897 and reaffirmed in recent years, that the introduction into evidence of unconstitutionally obtained out of court statements automatically requires reversal. No legitimate purposes would be served by extending the harmless-error rule to this category of cases. Indeed, extending that rule to the type of two-stage intentional error involved here would only serve to encourage some prosecutors to take unsavory gambles by introducing unconstitutionally obtained statements which they regard as potentially helpful to their case, but which they believe an appellate court may, on a cold record, regard as harmless. Nor should the Court now resurrect the discredited distinctions between confessions and admissions or between inculpatory and exculpatory statements.

ARGUMENT

I.

The Introduction of Admissions Made to an Undercover Agent Planted in Petitioner's Jail Cell Constituted a Violation of Petitioner's Constitutional Rights to Counsel and Against Self-Incrimination.

There can be no dispute about the unconstitutionality of the manner in which Peggy Fisk obtained petitioner's admissions. The California District Court of Appeals expressed no doubt about that in describing the events surrounding the admissions:

> It is almost incredible that in these days of enlightened treatment by prosecution authorities of persons charged with crime, the Peggy Fisk incident could

> have occurred. Peggy was an undercover agent, working in narcotics and employed by the sheriff. She was falsely booked in the jail as a narcotics violator and placed in a cell with defendant in the obvious hope that defendant would make some statement helpful to the prosecution. 53 Cal. Rptr. at 738.

The lower court also observed that:

> Peggy told defendant that she had talked to the sheriff and that they had discussed Peggy's getting "a floater out of the State." Peggy then said to defendant, "I put all my trust in Mr. Bland [the sheriff] and maybe it would do some good for you if you tried the same." Peggy indicated that she had mistrusted her own attorney and indicated that perhaps defendant should mistrust hers. *Id.* at 739.

The Court then concluded that:

> "The trick attempted by the authorities in which they apparently hoped to obtain incriminating statements from defendant and to get her to throw herself on the alleged mercy of the sheriff and to suspect her own attorney was completely indefensible, . . . We have in mind *Massiah* v. *United States*, 377 U.S. 201 . . . and *Escobedo* v. *State of Illinois*, 378 U.S. 478 . . . " 53 Cal. Rptr. at 740.

It would be difficult to imagine a more blatant violation of petitioner's federal constitutional right to counsel and against self-incrimination under *Massiah* and *Escobedo*, *supra*. And it is clear that the California District Court of Appeals would have reversed petitioner's conviction under those decisions if it had not entertained the erro-

neous beliefs that petitioner's counsel had not properly objected to Peggy Fisk's testimony (see Petition for Certiorari pp. 5-13) and that petitioner was not sufficiently prejudiced by the testimony (see *infra* pp. 31-33, conclusion and suggested disposition).

In *Massiah* v. *United States*, 377 U.S. 201 (1964) this Court held the "petitioner was denied the basic protection of the guarantee [of the Sixth Amendment] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." *Id.* at 206. In *Massiah*, as here, petitioner did not make a specific request to consult with his previously retained counsel, since he was unaware that he was being questioned by someone working for the government. This did not preclude reversal of *Massiah's* conviction, because as the Court noted (quoting from Judge Hays' dissent in the Court of Appeals, 307 F. 2d at 72-3):

> "if such a rule is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse. In this case, Massiah was more seriously imposed upon . . . because he did not even know that he was under interrogation by a government agent." 377 U.S. at 206.

Accordingly, there are only two differences between the *Massiah* case and the one at bar: 1) *Massiah* was a federal and this is a state case; and 2) The "indirect and surreptitious interrogation" in *Massiah* occurred after the defendant had been indicted and released on bail; while the "indirect and surreptitious interrogation" here occurred after petitioner was arrested and booked for murder and while

she was in jail awaiting indictment (and some of it even continued after she had been formally charged and arraigned). Petitioner will show, however, that this Court has held, in two cases decided before petitioner's trial began, that these differences are without significance.

In *McLeod* v. *Ohio*, 378 U.S. 582, decided on June 22, 1964, this Court held the rule announced in *Massiah* applicable to the states.[5] Consequently, the first of the above mentioned differences between *Massiah* and this case is without significance. In *Escobedo* v. *Illinois*, 378 U.S. 478, decided on June 22, 1964, the interrogation was conducted after defendant was arrested but before he had been indicted. The Court extended the *Massiah* rule to such interrogations, observing that:

> "It would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of the interrogation the authorities had secured a formal indictment. Petitioner had, for all practical purposes, already been charged with murder." 378 U.S. at 486.

Petitioner's trial began on January 11, 1965. At that time, therefore, this Court had announced the following rules:

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[5] In that decision, the Court remanded to the Supreme Court of Ohio for reconsideration in light of *Massiah* v. *United States*, 377 U.S. 201, thereby deciding that the *Massiah* rule applied to the states, but affording the Ohio court an opportunity to decide whether the facts in that case were governed by *Massiah*. When the Ohio Supreme Court affirmed the conviction, the Supreme Court reversed, citing *Massiah*, 381 U.S. 356 (1965).

1) Indirect and surreptitious questioning of a federal defendant by a government agent after he had been indicted and retained counsel violated his rights under the Sixth Amendment. *Massiah* v. *United States, supra.*

2) When the interrogation was indirect and surreptitious, no request to consult counsel need be made. *Massiah* v. *United States, supra.*

3) These rules apply to the states through the Fourteenth Amendment. *McLeod* v. *Ohio, supra.*

4) These rights do not depend, in cases where the defendant has been arrested and booked, on whether "the authorities had secured a formal indictment." *Escobedo* v. *Illinois.*[6]

These rules—and the decisions which embodied them—squarely cover the admissions made to Peggy Fisk in this case. The nature of the undercover activity was identical with that in *Massiah* (surreptitious questioning by a government agent), and the stage in the process was identical with that in *Escobedo* (defendant had been arrested, booked, and had retained counsel).[7] Consequently, those cases (combined with *McLeod* which applies *Massiah* to

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[6] The Court, in *Massiah* and *Escobedo* had also applied the rules to admissions as well as confessions; indeed in both of those cases, the incriminating statements were admissions rather than confessions. In *Miranda* v. *Arizona,* 384 U.S. 436 (1966) the Court extended these rules to exculpatory as well as inculpatory admissions, 384 U.S. at 444. Petitioner does not, however, place any reliance on *Miranda,* since the challenged statement here was the sort of inculpatory admission clearly covered by *Massiah* and *Escobedo.*

[7] Indeed, in this case, the improper police conduct continued even after petitioner had been formally charged and arraigned.

the states) require the conclusion that the manner in which Peggy Fisk obtained petitioner's admissions constituted a violation of petitioner's federal constitutional rights.[8]

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[8] *Miranda* v. *Arizona*, 384 U.S. 436 (1966), decided after petitioner's trial, added nothing to the cases decided before her trial which is relevant to the circumstances of this case; consequently, the rule announced by this Court in *Johnson* v. *New Jersey*, 384 U.S. 719 (1966) does not bar reversal of petitioner's conviction. *Miranda* added the following major elements to *Massiah* and *Escobedo*:

1) In *Escobedo* the defendant had requested an opportunity to consult with counsel. In *Miranda*, the Court held that "[a]n individual need not make a pre-interrogation request for a lawyer." 384 U.S. at 470. Instead he "must be clearly informed that he has the right to consult with a lawyer. . . ." *Id.* at 471.

But this did not change the law in cases like the one at bar, since it already had been held in *Massiah*, that a defendant who, like petitioner, was the victim of "indirect and surreptitious interrogation" need not have made a request for a lawyer, "because he did not even know that he was under interrogation by a government agent." *Massiah* v. *United States*, *supra* at 206.

2) In *Escobedo*, the defendant had retained a lawyer. In *Miranda*, the Court held that if a defendant is indigent, he had the right to have a lawyer appointed to represent him. 384 U.S. at 472-3.

But petitioner here was not indigent. She had already retained counsel. Accordingly, *Miranda* did not change the law as it applied to her. All the law she needed to establish the unconstitutionality of the challenged practice was announced prior to her trial. Accordingly, *Johnson* v. *New Jersey*, 384 U.S. 719 (1966), requires that this law be applied to her case; and an application of *Massiah* and *Escobedo* to this case requires the conclusion that petitioner's constitutional rights were violated by the introduction of evidence secured in the manner in which Peggy Fisk's testimony was obtained.

Even if this Court were to disagree with petitioner's contention that *Massiah* and *Escobedo* establish the unconstitutionality of Peggy Fisk's testimony, *Johnson* v. *New Jersey* would still be inapplicable. If *Massiah* and *Escobedo* do not establish the unconstitutionality of Peggy Fisk's testimony, then the facts of this case present a new and undecided issue requiring resolution by this Court. In that event, the Court should announce its resolution of the issue, and apply that resolution to petitioner in this case, see *Stovall* v. *Denno*, 388 U.S. 293, 301 (1967), citing Article III of the Constitution.

The Attorney General of California seems to concede that the conduct of the sheriff was unconstitutional. In a letter to the Clerk of this Court, dated July 10, 1967, he made the following statement:

> "Respondent did not argue and does not now advocate that the conduct of the sheriff and the undercover agent as set out at page 6 of Petitioner's Reply Brief was proper and not unconstitutional. Respondent hereby goes on record as condemning such conduct."

He goes on however, to make the incredible argument that petitioner's admissions were "spontaneous remarks" that had no connection with the conduct of the undercover agent.[9] The Attorney General is thus attempting to paint a portrait of a government agent passively sitting by and simply listening to the spontaneous remarks of the prime suspect in an important murder case.[10]

This fictional portrait not only defies common sense; it also flies directly in the face of the undisputed testimony of the undercover agent herself and of the findings of the California District Court of Appeal.

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[9] Our point is that on the record in this case there is no showing that the conduct of the undercover agent had any connection with petitioner's voluntary and spontaneous remarks. . . . " *Id.* at p. 1-2.

[10] Indeed, at one point the state tried to argue that Peggy Fisk was not only a passive listener, but even a reluctant one:

> "She stayed up in the jail with her for about a week and listened and when Mrs. Miller would talk to her, on two or three occasions, she told her 'Don't tell me about it,' but Mrs. Miller insisted on telling her. It is Mrs. Miller's right and privilege to talk, if she wants to." (Respondent's opposing brief on Certiorari at p. 10, quoting Rep. Tr. pp. 1010-1012.)

This is quite a contrast to what the prosecutor told the jury in his summation: "Everything that ingenuity could conceive was done to try to find out what happened. . . . " (R. 2320).

The record in this case clearly reveals that Peggy Fisk was not, in any sense, a passive auditor of petitioner's spontaneous statements. Miss Fisk's own testimony conclusively establishes that she induced petitioner, by carefully prepared and cleverly executed leading questions, to discuss the crime and make the statements in issue. Miss Fisk admitted that she began one "discussion" by telling petitioner that she had just overheard a conversation between four men from the District Attorney's Office in which one had said "Getting back to the Miller case, Arthwell Hayton came in and blew the top off the case" (R. 1107). Miss Fisk also testified that she was instructed to begin the discussion with this deliberate lie (R. 1107). This episode which is strikingly similar to those condemned by the Court in *Escobedo, supra,* and *Bram* v. *United States,* 168 U.S. 532 (1897), hardly fits the prosecutor's picture of a passive listener. Miss Fisk also testified that she began another discussion by showing petitioner a newspaper clipping which the police had supplied her and "possibly" said something about how the press was ruining her (R. 1104-05). The "conversation" continued with "passive" Peggy telling petitioner that she once had an attorney "which did not do me much good," and that petitioner should "think about it because maybe this would happen to her." She then told petitioner that she had spoken to Frank Bland (the sheriff) about the possibility of his dropping the charges against her (Peggy) and arranging "a floater out of the state," and said that "I put all my trust in Mr. Bland and maybe it would do some good for you if you tried the same" (R. 1106). Again, this outrageous and overt attempt to get the defendant to distrust her own lawyer hardly fits the passive picture the prosecutor is trying to paint. Miss Fisk testified further that she told petitioner that her own father

had burned to death much like the victim in this case (R. 1106). Such leading statements surely must have provoked discussion of the crime with which petitioner was charged.

Moreover, if Peggy Fisk's only job was to listen rather than to induce discussion, as the State claims, then why was it necessary to clear the cell of all persons other than petitioner and Miss Fisk? It is undisputed that when Miss Fisk first entered the cell, two other girls were present. Shortly thereafter, the other two were removed from the cell and Peggy and petitioner were left alone for the remainder of the seven days (R. 1107-08). These undisputed facts make it impossible to conclude that petitioner's statements were entirely "spontaneous" and in no way connected to the concededly unconstitutional conduct of the undercover agent.

In any event, the California District Court of Appeal explicitly rejected any notion that Peggy Fisk was merely a passive listener. It found that by placing her in the cell, the authorities "hoped to obtain incriminating statements from defendant and to *get her* [not a very "passive" phrase] to throw herself on the alleged mercy of the sheriff and to suspect her own attorney" (A. at 31, emphasis added). That Court also explicitly found that Peggy was placed in the cell "for the purpose of *conversing with* defendant in the obvious hope that defendant would make some statement helpful to the prosecution" (A. at 27, emphasis added).

The State argues however, that petitioner's admissions were not the result of "a process of interrogation," and that this case is therefore distinguishable from *Massiah* v.

United States, supra.[11] Ironically, that very argument was made and rejected in *Massiah* itself. In that case, the Solicitor General argued that:

> "Agent Murphy's testimony indicates that Colson did not coerce petitioner into making any incriminating statements or even induce him by appeals to talk in the guise of friendship. The recording of the entire conversation confirms this. *Petitioner talked freely* to Colson concerning their joint narcotics activities. Petitioner obviously did so because he believed that Colson was still his confederate and that they were facing criminal prosecution together. We submit that the *government may properly give a defendant the opportunity to make incriminating statements, where the only deception is that he believes his remarks are private.* When the defendant makes the incriminating statements freely, *i.e.*, without coercion or improper inducement, there is no reason why such relevant evidence should be excluded at trial." Brief for the United States in *Massiah* v. *United States,* at pp. 27-28 (emphasis added).

Indeed, a reading of the record in *Massiah* suggests that there was, if anything, less inducement there than in the case at bar. See Record in *Massiah* at 79-98.[12]

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[11] Respondent's opposing brief on Certiorari at 15: "The *Massiah* and *Escobedo* cases are not in point, because in both cases the statements were held to have been the result of a process of interrogation."

[12] This would seem to confirm the interpretation given *Massiah* by commentators and lower courts that "The real issue presented in *Massiah* is whether law-enforcement officials may seek evidence from an accused's own mouth when the accused does not realize that he is talking to such officials and is providing them with evidence

It is interesting to note, moreover, that the Solicitor General, in his brief in *Massiah*, specifically addressed himself to the precise situation involved in this case: "the admission of statements obtained through a jail-cell 'plant' . . . " *id.* at 32. He regarded this type of case as "more difficult than [*Massiah*] since the government had custody of the defendant and controlled his movements. [Whereas in *Massiah*], petitioner freely decided to enter Colson's automobile and talk to him." [13] We agree with the Solicitor General that if the police practice in *Massiah* was unconstitutional, then the police practice in this case, where the defendant was confined in a jail cell, is *a fortiori*, unconstitutional.

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that will help convict him" Enker and Elsen, Counsel for the Suspect: *Massiah* v. *United States* and *Escobedo* v. *Illinois*, 49 Minn. L. Rev. 47, 57 (1964). This harks back to an early formulation of the function of the privilege: "[T]he law will not suffer a prisoner to be made the deluded instrument of his own conviction." 2 Hawkins, Pleas of the Crown 595 (8th ed. 1824) (Emphasis added). Cf. *Paroutian* v. *United States*, 370 F. 2d 631 (2d Cir. 1967), cert. denied, 387 U.S. 943 (1967); *Stovers* v. *United States*, 361 F. 2d 301 (9th Cir. 1965).

[13] Petitioner in *Massiah* relied heavily on the case of *People* v. *Robinson*, 16 App. Div. 2d 184, 224 N.Y.S. 2d 705 (4th Dept. 1962) in which the New York Appellate Division had required the exclusion of a statement elicited from a confined suspect by an undercover police agent. The Solicitor General said that the "Robinson case involved a jail-cell 'plant,' which, as we have noted, is also a more difficult case than the one before the Court." Solicitor General's Brief at 31-32 note 13. In light of this exchange, the Court's citation with approval of the *Robinson* case in *Massiah*, takes on particular significance. *Massiah* v. *United States*, *supra* at 205.

II.

This Court Should Not Extend the Harmless Error Rule to the Intentional Introduction of a Defendant's Out of Court Statement Obtained by Unconstitutional Police Behavior.

Until recently, it had been widely assumed that "the commission of any constitutional error at . . . a criminal trial should require automatic reversal." [14] There was much support for this view in the decisions of this Court. "[I]n a long line of cases, involving a variety of constitutional claims in both state and federal prosecutions, this Court has steadfastly rejected any notion that Constitutional violations might be disregarded on the ground that they were 'harmless.'" [15] But in *Chapman* v. *California*,

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[14] Note, Harmless Constitutional Error, 20 Stanford Law Review 83, 84 (1967).

[15] *Chapman* v. *California*, 386 U.S. 18, 43 (Stewart, *J.*, concurring). Mr. Justice Stewart stated that illustrations of this principle "are legion" and offered the following in support of his statement:

"When involuntary confessions have been introduced at trial, the Court has always reversed convictions regardless of other evidence of guilt. As we stated in *Lynumn* v. *Illinois*, 372 U.S. 528, 537, the argument that the error in admitting such a confession 'was a harmless one . . . is an impermissible doctrine.' That conclusion has been accorded consistent recognition by this Court. *Malinski* v. *New York*, 324 U.S. 401, 404; *Payne* v. *Arkansas*, 356 U.S. 560, 568; *Spano* v. *New York*, 360 U.S. 315, 324; *Haynes* v. *Washington*, 373 U.S. 503, 518-519; *Jackson* v. *Denno*, 378 U.S. 368, 376-377. Even when the confession is completely 'unnecessary' to the conviction, the defendant is entitled to a new trial 'free of constitutional infirmity.' *Haynes* v. *Washington*, *supra*, 518-519.

"When a defendant has been denied counsel at trial, we have refused to consider claims that this constitutional error might have been harmless. 'The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.' *Glasser*

386 U.S. 18 (1967) the Court held "that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." *Id.* at 22. In so holding the Court did not intend to extend the harmless error rule to every type of constitutional error. Indeed, it reaffirmed the holding of its prior cases, that there are some constitutional rights so basic to a fair trial that their infraction can never be

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v. *United States*, 315 U.S. 60, 76. That, indeed, was the whole point of *Gideon* v. *Wainwright*, 372 U.S. 335, overruling *Betts* v. *Brady*, 316 U.S. 455. Even before trial, when counsel has not been provided at a critical stage, 'we do not stop to determine whether prejudice resulted.' *Hamilton* v. *Alabama*, 368 U.S. 52, 55; *White* v. *Maryland*, 373 U.S. 59, 60.

"A conviction must be reversed if the trial judge's remuneration is based on a scheme giving him a financial interest in the result, even if no particular prejudice is shown and even if the defendant was clearly guilty. *Tumey* v. *Ohio*, 273 U.S. 510, 535. To try a defendant in a community that has been exposed to publicity highly adverse to the defendant is *per se* ground for reversal of his conviction; no showing need be made that the jurors were in fact prejudiced against him. *Sheppard* v. *Maxwell*, 384 U.S. 333, 351-352; cf. *Rideau* v. *Louisiana*, 373 U.S. 723, 727. See also *Estes* v. *Texas*, 381 U.S. 532, 542-544, 562-564 (Warren, *C.J.*, concurring), 593-594 (Harlan, *J.*, concurring).

"When a jury is instructed in an unconstitutional presumption, the conviction must be overturned, though there was ample evidence apart from the presumption to sustain the verdict. *Bollenbach* v. *United States*, 326 U.S. 607, 614-615. Reversal is required when a conviction may have been rested on a constitutionally impermissible ground, despite the fact that there was a valid alternative ground on which the conviction could have been sustained. *Stromberg* v. *California*, 283 U.S. 359, 367-368; *Williams* v. *North Carolina*, 317 U.S. 287, 292. In a long line of cases leading up to and including *Whitus* v. *Georgia*, 385 U.S. 545, it has never been suggested that reversal of convictions because of purposeful discrimination in the selection of grand and petit jurors turns on any showing of prejudice to the defendant." *Id.* at 42-44 (footnotes omitted).

treated as harmless error." *Id.* at 23.[16] As an example of such a right, the Court cited "*Payne* v. *Alabama*, 356 U.S. 560 (coerced confession)." *Id.* at 23, note 8.

This Court should not now extend the harmless error rule to the type of constitutional error involved in this case —the intentional introduction of a defendant's out of court statement obtained by unconstitutional behavior—for the following reasons:

(A) Such an extension would necessitate the overruling of a long and uninterrupted line of cases dating back to 1897 and reaffirmed in recent years.

(B) It would commit the Court to the time-consuming and purposeless job of distinguishing, on a case by case basis, among various kinds of out of court statements (confessions v. admissions, inculpatory v. exculpatory statements) just at a time when it has rejected these distinctions in a related context.

(C) It would place the Court in the unseemly position of giving "final effect to a judgment tainted with [particularly reprehensible] intentional misconduct." See *Chapman* v. *California*, *supra* at pp. 18-19 (Harlan, *J.* dissenting).

(D) It would encourage some prosecutors to take unsavory gambles by introducing unconstitutionally obtained statements which they regard as potentially helpful to their case, but which they believe an appellate court may, on a cold record, regard as harmless.

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[16] In its concluding paragraph, the Court also said that the error in that case "can no more be considered harmless than the introduction against a defendant of a coerced confession. See, *e.g.*, *Payne* v. *Arkansas*, 356 U.S. 560", thus explicitly reaffirming its prior holdings that the introduction of a coerced confession always requires reversal. See discussion *infra*.

(E) And it would serve none of the salutary purposes advanced in support of the harmless error rule in other contexts.

A. Extending the Harmless Error Rule to This Type of Case Would Necessitate the Overruling of a Line of Cases Dating Back to 1897 and Reaffirmed in Recent Years.

The first case in which this Court explicitly considered the possibility of a harmless error rule in the context of a constitutional error was *Bram* v. *United States*, 168 U.S. 532 (1897). That case is remarkably similar to the one at bar, both in its facts and in the argument made by the prosecution. In *Bram*, the defendant had made an exculpatory statement after being told by a detective that another suspect had incriminated him.[17] This statement was then introduced by the government as an admission against interest.[18] The prosecution argued there, as it does here,

[17] The testimony about Bram's statement was as follows: "When Mr. Bram came into my office, I said to him: 'Bram, we are trying to unravel this horrible mystery.' I said: 'Your position is rather an awkward one. I have had Brown in this office and he made a statement that he saw you do the murder.' He said: 'He could not have seen me; where was he?' I said: 'He states he was at the wheel.' 'Well,' he said, 'he could not see me from there.' I said: 'Now look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown.' 'But,' I said, 'some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders.' He said: 'Well, I think, and many others on board the ship think, that Brown is the murdered; but I don't know anything about it.' He was rather short in his replies." 168 U.S. at 539.

[18] It is clear that the statement was not technically a confession, for it was not "an acknowledgment in express words, by the accused . . . of the truth of the guilty fact charged or of some essential part of it." 3 Wigmore, Treatise on Evidence §21 at p. 238. Nonetheless, the Court sometimes referred to it as a "confession." See *Id.* at 541. That it was not using "confession" in its technical sense is amply

that the statement was not prejudicial because it was exculpatory.[19] The Court specifically rejected that argument in language broad enough to require automatic reversal in every case where an unconstitutionally induced out of court statement—whether confession or admission, inculpatory or exculpatory—is introduced by the prosecution. The Court said:

> If found to have been illegally admitted, reversible error will result, since the prosecution cannot on the one hand offer evidence to prove guilt, and which by the very offer is vouched for as tending to that end, and on the other hand for the purpose of avoiding the consequences of the error, caused by its wrongful admission, be heard to assert that the matter offered as a confession was not prejudicial because it did not tend to prove guilt. *Id.* at 541.

The Court went on to make its position crystal clear by quoting with approval from a leading state case as follows:

> "The contradiction involved in the assertion that the statement of an accused tended to prove guilt, and therefore was admissible, and then after procuring its admission claiming that it did not tend to prove guilt, and could not, therefore, have been prejudicial,

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demonstrated by its statement that "we are not concerned with how far the confession tended to prove guilt." *Ibid.* The Court also quoted with approval the following statement from section 219 of Greenleaf on Evidence:

> "The rule excludes not only direct confessions, but any other declaration tending to implicate the prisoner in the crime charged, even though, in terms, it is an accusation of another, or a refusal to confess." *Ibid.*

[19] See Note, Harmless Constitutional Error, *supra*, note 14, at 84.

has been well stated by the Supreme Court of North Carolina, *State* v. *Rorie,* (1876) 74 N.C. 148;"

> "But the State says this was a denial of guilt and not a confession. It was a declaration which the State used to procure a conviction; and it is not for the State to say the declaration did not prejudice the prisoner's case. Why introduce it at all unless it was to lay a foundation for the prosecution? The use which was made of the prisoner's statement precluded the State from saying that it was not used to his prejudice." (p. 150) *Id.* at 542.

Thus, in 1897 the Court established a practice that it would not put itself in the position of second guessing the prosecutor concerning the prejudicial effect of a defendant's out of court statement. If the prosecutor did not think the statement would be helpful to his case—*i.e.,* prejudicial to the defendant—then why, asked the Court rhetorically, would he introduce it? This Court has never once departed from that practice in a case involving an out of court statement. Indeed, as recently as 1966, the Court explicitly answered the rhetorical question it had posed 70 years earlier: "If a statement made were in fact truly exculpatory," the Court said, "it would, of course, never be used by the prosecution." *Miranda* v. *Arizona,* 384 U.S. 436, 477.

During the intervening years between *Bram* and *Miranda,* the Court has constantly regarded the introduction of unconstitutionally induced out of court statements as grounds for automatic reversal, without regard to the "independent evidence tending to demonstrate the guilt of the petitioner." *Haynes* v. *Washington,* 373 U.S. 503,

518 (1963).[20] This has been the Court's practice even where the other evidence of guilt is overwhelming. See *e.g.: Rogers* v. *Richmond,* 365 U.S. 534, 541 (1961); *Payne* v. *Arkansas,* 356 U.S. 560 (1958). And as Mr. Justice Stewart has correctly observed:

> None of these decisions suggests that the rejection of a harmless error rule turns on any unique evidentiary impact that confessions may have. *Haynes* v. *Washington,* 373 U.S. 503, specifically contradicts that notion. In addition to the confession found inadmissible by this Court, the defendant in *Haynes* had given two prior confessions, the admissibility of which was not disputed, and substantial independent evidence of guilt existed. The court accepted the prosecution's contention that the inadmissible confession played little if any role in the conviction.

Chapman v. *California,* 386 U.S. 18, 43, note 1 (concurring opinion). This is not to deny, of course, that the introduction of defendant's out of court statements, whether confessions or admissions, generally do have unique evidentiary value.

> "The introduction into evidence of a defendant's out of court statement implicating himself in the crime charged is a significant step in the prosecution's attempt to obtain a conviction. The impact of such a statement stems not only from its contents, but also

[20] Indeed, this Court has suggested that the availability of other evidence makes the police activity in obtaining a statement even "more unwarranted because so unnecessary." *Haynes* v. *Washington,* 373 U.S. 503, 519 (1963).

from its tendency to make the prosecution's entire case seem credible." [21]

B. Extending the Harmless Error Rule to This Type of Case Would Commit the Court to the Time-Consuming and Purposeless Job of Distinguishing, on a Case by Case Basis, Among Various Kinds of Out of Court Statements (Confessions v. Admissions, Inculpatory v. Exculpatory Statements) Just at the Time When It Has Rejected These Distinctions in a Related Context.

This Court has not distinguished between "confessions" and "admissions," or "inculpatory" and "exculpatory" statements in deciding whether unconstitutionally obtained out of court statements can ever be harmless. Indeed, some of the leading cases involve admissions and exculpatory statements. In *Bram* v. *United States, supra,* the statement in question was surely not a confession; it was an exculpatory attempt to deny guilt. And the statement in *Escobedo* v. *Illinois,* 378 U.S. 478 (1964), was almost identical to the one in *Bram*: "the defendant fully intended his accusation of another as the slayer to be exculpatory as to himself." *Miranda* v. *Arizona, supra* at 477. Nonetheless, the Court in *Bram* held explicitly, and the Court in *Escobedo* implicitly, that it would not inquire into the prejudicial effect of the statement; it will automatically require reversal, if the statement was introduced.

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[21] Note, 79 Harv. L. Rev. 935, 951 (1966) and see cases cited therein. This observation aptly describes the role of the admission involved in the instant case. Mrs. Miller's admission that she continued to love Hayton even after her husband's death did indeed tend to "make the prosecution's entire case seem credible." See *infra* Conclusion and Suggested Disposition.

This Court should not now, for the first time, make the application of the automatic reversal rule turn on whether the unconstitutionally introduced statement was an admission rather than a confession or exculpatory rather than inculpatory. These anachronistic and technical distinctions, which have needlessly consumed much judicial energy over the years, serve no useful function. It would be particularly ironic for this Court to resurrect these distinctions in the harmless error context at a time when it has just completed their internment in a closely related context. In *Miranda* v. *Arizona, supra,* the Court held that:

> The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of *any* statement made by a defendant. *No distinction can be drawn between statements which are direct confessions and statements which amount to "admissions" of part or all of an offense.* The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Similarly, for precisely the same reason, *no distinction may be drawn between inculpatory statements and statements alleged to be merely "exculpatory."* If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. *Id.* at pp. 476-77 (emphasis added).[22]

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[22] In the recent case of *People* v. *Powell,* 59 Cal. Rptr. 817, 429 P. 2d 137 (1967), the California Supreme Court relied on the distinction between confessions and admissions, holding that the "introduction of a confession obtained from the defendant in violation of constitutional guarantees is prejudicial *per se* and compels reversal regardless of other evidence of guilt;" (citing many federal

C. Extending the Harmless Error Rule to This Sort of Case Would Place the Court in the Unseemly Position of Giving "Final Effect to a Judgment Tainted With [Particularly Reprehensible] Intentional Misconduct".

No doctrine of harmless error should be permitted in a case of this sort which fits squarely into the suggested rule that "certain types of official misbehavior require reversal simply because society cannot tolerate giving final effect to a judgment tainted with such intentional misconduct." [23] Even the California District Court of Appeals was shocked at the "incredible" and "completely indefensible" trick employed by the authorities to get petitioner to make certain statements and to "throw herself on the alleged mercy of the sheriff and to suspect her own attorney." [24] This is in

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cases), whereas "the erroneous introduction of an admission is not prejudicial *per se* and the appellate court must weigh its impact on the trial in the light of the appropriate 'harmless error' test" (citing only local California cases). *Id.* at 148. The court conceded that there were "difficulties" in trying to make such a categorization, but nevertheless proceeded to do so. A close reading of the decision reveals that the California Courts are not even following the rulings of this Court in the area of confessions. The Court talks about an "exception" to the rule requiring automatic reversal when an unconstitutionally obtained confession is introduced at trial. This exception prevails when the unconstitutionally obtained confession is cumulative of other valid confessions. This exception flies directly in the face of the explicit holding of this Court in *Haynes* v. *Washington*, 373 U.S. 503, see *supra*, text following footnote 20.

[23] *Chapman* v. *California*, *supra* at 52 note 7 (Harlan, *J.*, dissenting), citing *"Berger* v. *United States*, 295 U.S. 78 (prosecutorial misconduct)."

[24] Indeed, the California District Court of Appeal considered the possibility of reversing the conviction "just to administer to the sheriff and those joining in this most *inexcusable* procedure a *well-merited rebuke* . . ." (emphasis added). The Court concluded however, that to do so "would not be fair to the county of San Bernardino nor to the defendant in requiring her to undergo the

stark contrast to the situation in *Chapman* v. *California, supra,* where the comments by the prosecutor and judge were explicitly authorized by the state constitution and not yet disapproved by this Court at the time they were made. *Id.* at 19.

D. Extending the Harmless Error Rule to the Prosecutor's Deliberate Decision to Introduce a Statement Deliberately Induced in Violation of the Constitution Would Encourage Some Prosecutors to Take Unsavory Gambles by Introducing Unconstitutionally Obtained Statements Which They Regard as Potentially Helpful to Their Case, But Which They Believe an Appellate Court May, on a Cold Record, Regard as Harmless.

This Court has never applied, and should not now apply, the harmless error rule to a two-stage constitutional error such as that involved in the case at bar. In this case, there was "intentional misconduct" by the state at two distinct points: (1) when they intentionally planted Peggy Fisk in petitioner's jail cell; and (2) when they intentionally introduced Miss Fisk's testimony at petitioner's trial. This should be distinguished from the situation in *Chapman* v. *California, supra,* where the making of the objectionable remark constituted a *single* error (which had not even been held unconstitutional at the time it was made). In the case

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strain of another trial." Petitioner hereby goes on record as indicating her willingness—indeed her desire—to undergo another trial at which the objectionable testimony would not be admitted. As for any unfairness to the County (as distinguished from "the sheriff and those joining in this most inexcusable procedure"), it must be recalled that the sheriff was acting as an agent of, and on behalf of, the County. Only by reversing such convictions—at the cost to the County of a new trial—can the court's hope to discourage such "inexcusable" practices.

at bar, the sheriff made a calculated decision to violate the constitution in order to obtain evidence helpful to the state, and the prosecutor made a second calculated decision to introduce the evidence which he knew was unconstitutionally obtained. The prosecutor made this decision because he regarded that evidence as sufficiently helpful to his case—i.e. prejudicial to petitioner—to warrant the risk of appellate reversal. "Why introduce it at all unless it was to lay a foundation for the prosecution?" [25] This Court should not now let the prosecutor "have his cake and eat it too." It should not put itself in the position of second-guessing the prosecutor on the basis of a cold record. Whenever the prosecutor has made a calculated decision to introduce unconstitutionally induced out of court statements, this court should assume—as the prosecutor himself assumed—that such statements were prejudicial.

If this Court begins to second-guess such prosecutorial decisions, it will only encourage some prosecutors to take

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[25] *State* v. *Rorie* (1876), 74 N.C. 148, quoted with approval in *Bram* v. *United States, supra* at 542. This Court has never found harmless error in a case involving a two-stage intentional error. In *Motes* v. *United States,* 178 U.S. 458 (1900), one co-defendant had made a voluntary statement incriminating other defendants. The prosecutor had acted entirely properly in obtaining this statement. The maker of the statement then escaped as a result of "the negligence of the prosecution," *Id.* at 474, and the prosecution then introduced the statement. This Court held that it should have been excluded, as a "violation of the constitutional right of the defendant's to be confronted with the witnesses against them" *Id.* at 471. The Court reversed the convictions of all the defendants except *Motes,* since the "case as to him rests on peculiar grounds:" he made a complete and "conclusive" confession of guilt at the trial so as "to require a verdict of guilty as to him, even if the jury had disregarded (the other) statements altogether." *Id.* at 475. *Motes* is apparently the "first and only time" the Court has ever "held harmless an error that violated the Constitution." Note, 20 Stanford L.R. 83, 85 (1967). The "peculiar grounds" of that case—Motes' in court confession—severely limits its precedential value.

unsavory gambles: to introduce unconstitutionally-induced statements which they regard as potentially helpful to their case, but which they believe an appellate court may, on a cold record, regard as "harmless."

E. Extending the Harmless Error Rule to This Type of Two-Stage Intentional Error Would Serve None of the Salutary Purposes Advanced in Support of the Harmless Error Rule in Other Contexts.

There are no affirmative reasons for permitting a harmless error rule in the context of a two-stage intentional error. When the alleged error is a single "bungle" by the prosecutor or the judge, the argument for a harmless error rule is at least understandable: The absence of such a rule might convert the criminal trial into "a game for sowing reversible errors in the record."[26] But when the error is two staged and intentional, as it was here, then its "sowing" is under the direct control of the prosecutor and not the defendant. And there is simply no good reason for an appellate court to treat as harmless a statement which a calculating prosecutor deliberately introduced in the hope that it would help his case.[27]

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[26] *Kotteakas* v. *United States*, 328 U.S. 750, 759 (1946), quoted in *Chapman* v. *California, supra*, at 49 (Harlan, *J.*, dissenting).

[27] Mr. Justice Stewart explicitly recognized this when he observed "Prosecutors are unlikely to indulge in clear violations of *Griffin* in the future, and if they do, I see no reason why the sanction of reversal should not be the result." Even the California courts have apparently held that "reversal will be required when the tainted evidence is introduced in intentional violation of constitutional standards. See *People* v. *Sarazzaswki*, 27 Cal. 2d 7, 161 P. 2d 934." *Chapman* v. *California, supra* at 52 (Harlan, *J.*, dissenting).

Conclusion and Suggested Disposition

Even if this Court rejects petitioner's argument that *all* unconstitutionally obtained out of court statements introduced into evidence must be deemed prejudicial, it should not affirm this conviction. The record in this case plainly establishes that the California District Court of Appeals, which decided the case before this Court's decision in *Chapman* v. *California, supra,* applied an improper standard of harmless error, and that the error in this case could not possibly be found harmless under a correct standard. Accordingly, this Court should either reverse the conviction on the authority of *Chapman,*[28] or vacate the judgment and remand the case to the California Courts for reconsideration in light of that intervening decision (as it has already done in a number of other cases decided after *Chapman*).[29]

The critical factual issue in the trial of this case was whether the fire that caused Dr. Miller's death was of accidental or incendiary origin (R. 244, 262, 1578, 1809-10). In attempting to persuade the jury that the fire was started by petitioner, the state relied most heavily on petitioner's alleged motive for wanting her husband dead: her love for Arthwell Hayton, with whom she had concededly had an affair and with whom, according to the state's theory, she was *still* infatuated. (See e.g., R. pp. 4-5, 10, 12, 1258, 2015, 2019, 2025.) The defense, in its effort to cast doubt upon the state's motive theory, attempted to show that petitioner's infatuation with Hayton had *ended* before her husband's death (R. 874, 935, 1783-88).

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[28] See, *Olmstead* v. *United States,* 277 U.S. 438, 466, 488 (1928).

[29] See note 32, *infra.*

It is in light of this trial background that one must evaluate the impact of Peggy Fisk's testimony that petitioner had admitted to her after Dr. Miller's death that "she did not love her husband" and that "she had always loved Mr. Hayton and *still loves him*" (emphasis added). This was the *only* evidence establishing the government's disputed assertion that petitioner continued to love Hayton up to and after her husband's death; and it must have been quite persuasive, coming as it allegedly did from the mouth of the petitioner herself.

That the prosecutor regarded Peggy's testimony as important is evidenced by his use of it in his closing argument to the jury (a use which the California District Court of Appeals failed to mention in its opinion holding the testimony harmless). Quotation of one such statement makes it clear that the testimony was prejudicial:

> How about Mr. Hayton? She testified that her love for him died the same time her husband did . . . But that's not what she told the girl up in jail. She told the girl up in jail that she still loved Hayton, felt that he would come to her (R. 2019).[30]

Could any court confidently say, in the context of this "close" case where motive played such a central role, that there was no "reasonable *possibility* that the evidence complained of *might* have *contributed* to the conviction?" *Fahy* v. *Connecticut*, 375 U.S. at 86, 87 (emphasis added).[31] Has

[30] See also R. 2061-62. In his argument opposing an advisory verdict at the close of the state's case, the prosecutor also emphasized petitioner's admission to "the girl up in jail that she still loved Mr. Hayton. She did not love her husband" (R. pp. 1258-59).

[31] The jury deliberated for more than three days (R. 2376). The District Court of Appeals noted that this case of "circumstantial evidence . . . was bitterly contested," and that "much of the evidence was conflicting." 53 Cal. Rptr. at 727.

the state, which was "the beneficiary of [the] constitutional error," proved "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained?" *Chapman* v. *California, supra,* at 4199. Since this Court cannot, on the record of this case, "declare a belief that [the error] in this case was harmless beyond a reasonable doubt," it should reverse petitioner's conviction so that she may be given a new trial at which the unconstitutional evidence would not be admitted.

At the very least, this court should vacate and remand for reconsideration in light of *Chapman* v. *California, supra,* which was decided after the last action of the California courts in this case, and which conclusively establishes that the District Court of Appeals in deciding that the introduction of Peggy Fisk's testimony was harmless error, was applying an erroneous constitutional standard.[33]

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[33] In his opinion, Justice Bray verbalized the rule in a number of different ways. As one point—while discussing defense counsel's alleged failure to object—he remarked that the court would be empowered to order a reversal, despite counsel's failure to object, "if he had the slightest idea that defendant was injured . . ." 53 Cal. Rptr. at 740. At another point, he remarked that Peggy Fisk's testimony "did little if any harm to defendant." (Emphasis added.) But is it not necessary to undertake a close analysis of Justice Bray's differing verbal formulae. Whatever language he chose to employ, this Court should assume that he was applying the mandatory standard which the California Constitution required him to apply.

> "No judgment shall be set aside . . . unless after an examination of the entire case . . . the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." California Constitution, Art. VI § 4½.

This was the very standard which, as construed by the California Courts, was declared unconstitutional in *Chapman* v. *California.* And this was the standard which this Court assumed was applied by the California courts in the numerous cases which, on March 13, 1967, it remanded for reconsideration in light of *Chapman,* see 35 L.W. 3320-21.

(continued on following page)

For the foregoing reasons, it is respectfully submitted that the judgment of the court below be reversed, or in the alternative, that the case be remanded for reconsideration in light of *Chapman* v. *California, supra.*

Respectfully submitted,

F. LEE BAILEY
Counsel for Petitioner

One of those cases was *People* v. *Otwell* (sub nom. *People* v. *Butts*). In that case, the California District Court of Appeal had held, prior to this Court's decision in *Chapman*, that the prosecutor's comment on Otwell's failure to take the stand was "harmless error". There too the California court used language which might seem to conform to the *Chapman* criterion: "it could hardly have altered the jury's view . . ."; "a verdict of acquitted or of guilt of a lesser offense would have been a veritable blunder." 236 C.A. 2d 817, 833-34 (1965). But there too, this Court remanded for reconsideration in light of *Chapman*, 87 S. Ct. 1036 (1967). And reconsideration led to a different outcome by the California District Court of Appeal. See *People* v. *Otwell*, 61 Cal. Rptr. 427 (1967).

Counsel has learned, via telephone communication with the clerks of Court, that there have also been reversals in *People* v. *Stanley Ray Davis*, 1 Crim. 5101 (Cal. Dist. Ct. App., 1st App. Dist. San Fran.), previous decision 87 S. Ct. 1038.